84-1884

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

NARCISO GONZALEZ-RIOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Petitioner was entitled to a multiple conspiracy instruction telling the jury he was entitled to an acquittal if the evidence established that Petitioner was a member of another conspiracy not the one charged in the indictment?

2. Whether the trial court failed to correctly answer questions from the jury concerning the law?

3. Whether the evidence was insufficient to convict the Petitioner?

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IN THE

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October Term, 1985

No.

NARCISO GONZALEZ-RIOS, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioner, NARCISO GONZALEZ-RIOS, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on October 4, 1983. A petition for rehearing was denied by the Court of Appeals on April 3, 1985.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is attached as Appendix "A" hereto. The order denying the petition for rehearing is attached as Appendix "B".

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 4, 1985. The order denying a rehearing was entered on April 3, 1985. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1) and (2).

STATEMENT OF THE CASE

The Petitioner, Narciso Gonzalez-Rios, was convicted after a jury trial in the United States District Court in California of two felony offenses. Count I alleged conspiracy to distribute and to possess with intent to distribute heroin

and cocaine in violation of 18 U.S.C., sections 846 and 841(a)(1). Count XV alleged that on August 21, 1981, the Petitioner, Narciso Gonzalez-Rios, used a telephone in committing and facilitating the commission of narcotic felonies in violation of 18 U.S.C., section 843(b). The convictions were affirmed by the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE FACTS

The evidence established that on August 22, 1981, the Petitioner, Narciso Gonzalez-Rios, left his home with his wife and children and drove to Garfield Avenue. There he met Jose Luis Serrano-Rivera and another man. The two cars then drove to the residence at 421 North Concourse Avenue where the Petitioner and his family and Mr. Serrano-Rivera and the other man entered the residence. Later, the Petitioner and

his family were observed leaving the residence and they then drove to their home. Other evidence in the case established that Jose Luis Serrano-Rivera had been selling narcotics with the help of Daniel Vasquez-Silva. On September 4, 1981, a search warrant for Mr. Serrano-Rivera's home at 1124 Serene Drive resulted in the discovery of narcotics at that location. On the same date, narcotics was found at 421 North Concourse Avenue, a second residence maintained by Mr. Serrano-Rivera. However, there was no further evidence offered concerning what occurred on August 22, 1981 at the Concourse residence when the Petitioner met with Mr. Serrano-Rivera on that date.

On September 4, 1981, DEA agents searched the residence of the Petitioner at 4617 Degoveia Avenue in Woodland Hills. The agents found a pistol, a rifle, a

ledger written in Spanish with numbers on it, U.S. currency in the amount of $3,000 in the house, a key to a safety deposit box which contained an additional amount of U.S. currency in the amount of $2,000, and a hot box, a device for testing the purity of narcotics, located in the attic. The agents found no narcotics on the premises. There were no scales or milk sugars used as cutting agents for narcotics. In the defense case, Petitioner denied knowledge of the hot box in the attic and testified that he had only resided at that residence since January of 1981, and that he had never entered the attic.

Transcripts of four telephone calls were read to the jury. Each of these telephone calls involved a conversation between the Petitioner and Jose Luis Serrano-Rivera. They all occurred in the month of August, 1981. A government agent

testified that Mr. Serrano-Rivera used a code language in which the word "cattle" referred to heroin and "ranch" referred to a place where heroin is made. During the four telephone call conversations, both Serrano-Rivera and Petitioner discuss cattle, money and a ranch.

Because of the numerous defendants in the case, the Petitioner requested an instruction on multiple conspiracies. Petitioner requested the following instruction which the trial court refused to give:

> You are further instructed with regard to the alleged conspiracy offense, that proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the single conspiracy charged in the indictment existed between two or more conspiractors. If you find that no such conspiracy existed, then you must acquit

the defendants as to that charge. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.

If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit the defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other separate conspiracy.

The instruction actually given in this case was far different from the one requested by Petitioner. The instruction given omitted the key concept of when an acquittal was appropriate. That instruction reads:

The Indictment charges in Count One that the defendants and other persons conspired to violate the federal narcotics laws. While the Court does not intend in any way to suggest that you should do so, you may find that the evidence in the case has not proven beyond a reasonable doubt that a single

overall conspiracy existed involving two or more of the persons named in Count One. Instead, you may find that the evidence shows the existence of two or more separate conspiracies. If you should so find, you may also find that while an accused was a member of at least one of the separate conspiracies, he was not a member of all of the conspiracies you find proven. Whether there was one conspiracy, more than one conspiracy, or no conspiracy at all, and whether an accused was a member of any conspiracy proven, are facts for you to determine in accordance with the instructions that I have given with regard to conspiracy.

If you find that an accused conspired with any other person named in Count One of the Indictment, then you should find him guilty of the charge alleged in Count One as long as you find that each of the elements of the offense of conspiracy just explained to you has been proven beyond a reasonable doubt. This is so even if you find that other persons named in Count One entered into separate conspiracies not involving the accused.

In deciding whether an accused is guilty of any

offense charged against him, you may not consider as evidence against that accused acts of or statements made by any other person with whom the accused did not conspire, or evidence admitted against any other person with whom the accused did not conspire.

REASON FOR GRANTING THIS PETITION

I

THE PETITIONER WAS ENTITLED TO A MULTIPLE CONSPIRACY INSTRUCTION TELLING THE JURY HE WAS ENTITLED TO AN ACQUITTAL IF THE EVIDENCE ESTABLISHED THAT PETITIONER WAS A MEMBER OF ANOTHER CONSPIRACY, NOT THE ONE CHARGED IN THE INDICTMENT

The essence of Petitioner's proposed jury instruction is that the jury was told that "If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit that defendant." United States v. Tramunti, 513 F. 2d 1087, 1107 (2nd Cir. 1975). The rejected jury instruction correctly instructed the jury pursuant to Devitt and Blackmar, Federal Jury Practice and Instructions, Instruction No. 27.16. The instruction is identical to the jury instruction that was given in United States v. Bailey, 607 F.2d 237, 243 n.14 (9th Cir. 1979). See also,

United States v. Thomas, 586 F.2d 123,132 (9th Cir. 1978). This instruction has its origin in United States v. Tramunti, 513 F. 2d 1087, 1107 (2nd Cir. 1975). See also, United States v. Bynum, 485 F.2d 490, 497 (2nd Cir. 1973). In addition to the Second Circuit, the identical instruction has been adopted and approved by the First, Fifth and District of Columbia Circuits. See, United States v. Flaherty, 668 F.2d 566, 581 (1st Cir. 1981); United States v. Gantt, 617 F. 2d 831, 847 (D.C. Cir. 1980); United States v. Diecidue, 603 F.2d 535, 549 (5th Cir. 1979); United States v. Abushi, 682 F.2d 1289 (9th Cir. 1982).

The jury instruction that was given in this case did not inform the jury that they should acquit any defendant who was found to have been a member of another conspiracy, where that conspiracy was not the one charged in the indictment. The

jury was told in this case, pursuant to a jury instruction offered by the government, that "If you find that an accused conspired with any other person named in Count I of the indictment, then you should find him guilty of the charge alleged in count I as long as you find that each of the elements of the offense of conspiracy just explained to you have been proven beyond a reasonable doubt. This is so even if you find that other persons named in Count I entered into separate conspiracies not involving the accused."

The government's jury instruction which was given in the instant case informed the jury that they could convict any defendant of the conspiracy charged in Count I as long as the jury found that all of the elements of the crime of conspiracy had been found. Nowhere does the jury instruction given make the distinc-

tion between the conspiracy charged in Count I and other separate conspiracies which are not charged in Count I. If, for example, the jury found that the Petitioner was a member of a conspiracy, and all of the elements of the crime of conspiracy were found beyond a reasonable doubt, under the jury instructions given in this case, the jury could have returned a guilty verdict, even though the conspiracy found was not the same conspiracy which was charged in Count I of the indictment. This is contrary to federal law and was prejudicial error in this case.

II

THE TRIAL COURT FAILED TO CORRECTLY ANSWER QUESTIONS FROM THE JURY CONCERNING THE LAW

During the course of the jury deliberation, the jury asked the court whether "a finding of guilty of any element of count one (i.e. (a),(b),(c),(d)) is a finding of guilt of the entire count one?" The court failed to answer the jury's inquiry informing the jury that their question was ambiguous and that the court needed further clarification.

The question was never clarified by the jury; rather, the jury merely returned verdicts of guilty as to all defendants and all counts. The confusion that existed is that there were several subparts (a) through (d) in the indictment. One of these subparts referred to the criminal objects of the conspiracy, another referred

to the means by which the conspiracy was furthered, and the final section referred to the overt acts in the conspiracy.

In the leading case of Bollenbach v. United States, 326 U.S. 607, 612-617 (1964), the Ccurt states that "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy." See also, Powell v. United States, 347 F.2d 156 (9th Cir. 1965); United States v. Petersen, 515 F. 2d 1133 (9th Cir. 1975); United States v. Walker, 575 F. 2d 209 (9th Cir. 1978). This legal standard was violated in the Petitioner's case.

III

THE EVIDENCE WAS INSUFFICIENT TO CONVICT THE PETITIONER

The evidence against Petitioner consisted primarily of four telephone conversations and a DEA agent's opinion that the conversations concerned drugs. The relevant question "is whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318-319 (1979); see also, United States v. Fleishman, 684 F. 2d 1329, 1340 (9th Cir. 1982); United States v. Federico, 658 F.2d 1337, 1343 (9th Cir. 1981); United States v. Bailey, 607 F.2d 237, 243 (9th Cir. 1979).

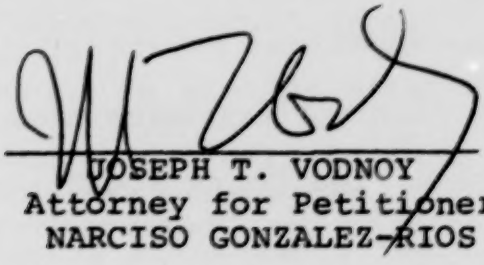
The Petitioner believes his case is indistinguishable from three cases that found insufficient evidence: United

United States v. Bailey, 607 F.2d 237 (9th Cir. 1979); United States v. Quintana, 508 F. 2d 867 (7th Cir. 1975); United States v. Jit Sun Loo, 478 F. 2d 401 (9th Cir. 1973). In each of these cases, the government relied upon telephone call conversations overheard during the course of wiretap communications. In each of the cases, the Court found that without any further independent evidence, the telephone call conversations themselves failed to establish that the defendant was involved in any type of a conspiracy as alleged in the various indictments.

CONCLUSION

Based upon the foregoing, the Petitioner urges that this petition be granted.

Respectfully submitted,



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APPENDIX "A"

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 82-1108, 82-1157,
82-1200, 82-1249
DC No. CR 81-846-MML

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

GREGORIO SUAZO TORRES,
JOHN RODRIGUEZ,
NARCISO GONZALEZ-RIOS,
GERONIMO GUTIERREZ-SANCHEZ,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of California
Malcolm M. Lucas, District Judge, Presiding

Argued and Submitted July 8, 1983

M E M O R A N D U M

[Filed Oct. 4, 1983]

Before: FERGUSON and BOOCHEVER,
Circuit Judges, and COYLE,*
District Judge

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*Honorable Robert E. Coyle, United States District Judge for the Eastern District of California, sitting by

(footnote continued)

designation.

The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Ninth Circuit for disposition by published opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to this court as precedent.

In September 1981 twelve persons were indicted and charged with sixteen counts of violating the federal narcotics laws, including conspiracy to possess heroin and cocaine with the intent to distribute and the unlawful use of a telephone to facilitate felony narcotics offenses. 21 U.S.C. §841(a)(1), 843(b) and 846.

Three of the defendants pleaded not guilty and were convicted following a consolidated jury trial. A fourth pleaded not guilty, waived a jury trial, and entered into a stipulation with the government as to the facts. He was convicted following a court trial. In this consolidated appeal the four defendants, in various combinations, urge reversal on ten separate grounds. We reject their contentions and affirm the verdict below.

1. The district court correctly instructed the jury on the possibility of

multiple conspiracies. The conspiracy instruction was based upon the holding of United States v. Griffin, 464 F.2d 1352, 1357 (9th Cir.), cert. denied, 409 U.S. 1009 (1972), and conforms to the standards set out in that case. The instruction directed the jury that it could find that one or more than one conspiracy existed, and that it could find that the defendants had been members of one or more of the conspiracies, but not necessarily all of them. If it so determined, the jury might reach a verdict of guilty with regard to one or more of the defendants, but in so doing, it could not consider evidence admitted against a co-defendant with whom the jury was unable to conclude that the defendant under consideration had conspired. This instruction protects the defendant from prejudicial evidence that should not be used against

him while also precluding the possibility of the "windfall" acquittal cautioned against in United States v. Eubanks, 591 F. 2d 513 (9th Cir. 1979).

2. The district court did not err in its response to the questions submitted by the jury during its deliberations. The jury's note did not show actual confusion about or misunderstanding of the court's conspiracy instruction, but merely a hesitation in acting on its understanding. Throughout its deliberations the jury had in its possession a copy of the jury instructions. Those instructions were clear as to the issue in question, and the jury was free to examine them at any time. Furthermore, the possibility that the jury was referring to the overt acts lettered "a" through "p" in the indictment is unlikely. The jury's note listed "(a), (b), (c), (d)," leaving no room to suggest

that it was referring to more than that. The transcript clearly indicated that at the time that the note was received no one present understood it as making reference to the sixteen overt acts listed in the indictment.

Nor did the court err in its response to the note which defendant Rodriguez alleges referred to him alone. The court's response informed the jury that it could not determine what decisions the jury could reach or whether those decisions were logical. The jury was told, however, that the verdicts need not be the same as to all counts or as to all defendants. Rodriguez's suggestion that the court's response mention him directly was improper and, had it been followed, would have created a potential for great prejudice.

3. The district court did not abuse its discretion in denying the motions for

severance. Generally, persons who have been indicted together should be tried together. Whether severance is necessary is a question left to the discretion of the trial court and its decision will not be reversed without a showing of abuse. United States v. Ortiz, 603 F.2d 76, 78 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980). The court must balance the burden and cost of separate trials against the possible prejudice to the defendants of a joint trial. A showing that a defendant would have a better chance of acquittal if tried separately is not sufficient. United States v. McDonald, 576 F.2d 1350, 1355 (9th Cir.), cert. denied, 439 U.S. 830 (1978).

This general rule holds true for persons charged together in a conspiracy, even though one defendant's role in the crime may have been relatively minor or

the evidence against a co-defendant more damaging. A co-conspirator is vicariously liable for all of the acts of another conspirator even though he may not have directly participated in those acts. United States v. Saavedra, 684 F.2d 1293 (9th Cir. 1982); citing United States v. Basey, 613 F.2d 198, 202 (9th Cir. 1979), cert. denied, 446 U.S. 919 (1980). Each conspirator need not be aware of the identity of all of the other conspirators. When each knew from the scope of the operation that others were involved in functions vital to the success of the operation, knowledge of the conspiracy is proven. United States v. Friedman, 593 F. 2d 109 (9th Cir. 1979).

The monitored telephone clearly showed that each of the defendants in the instant case was aware of participation by others. Torres, who supplied the lactose

as a diluting agent, was aware that the diluted narcotic was later distributed to sellers. Rodriguez, who distributed the narcotics to Oxnard, was recorded requesting "half" of a shipment of heroin, thus indicating that he was aware of the existence of other distributors. And Gonzales-Rios, who assisted Serrano-Rivera in the original purchase, was found to be in possession of the name and number of Gutierrez-Sanchez, who tested the narcotics for purity.

The defendants have not met their burden of showing that without severance, they were denied a fair trial. United States v. Sears, 663 F. 2d 896 (9th Cir. 1981).

4. The use of wire surveillance was not improper. 18 U.S.C. §2518(1) requires that as application for a wiretap be made to a judge of competent jurisdiction for prior approval of the interception.

The application must set out a statement of the facts "as to the particular offense that has been, is being, or is about to be committed" and a "particular description of the communication sought to be intercepted." The application and order must name the person whose communications are to be intercepted but need not name persons who are unknown at the time of the application. United States v. Baker, 589 F.2d 1008 (9th Cir. 1979). Most important, wiretaps are not to be used as the first step in an investigation. In order to justify electronic surveillance, the application must set out the investigative need, stating why other techniques have failed or would fail. United States v. Martinez, 588 F.2d 1227, 1231-33 (9th Cir. 1978). The government is not required to exhaust all possible investigatory techniques first, United States v. Martin, 599 F.2d

880, 886-87 (9th Cir. 1979), but more than conclusory language is necessary to give the affidavit underlying the application validity, United States v. Martinez, 588 F. 2d at 1231, and as with any other search and seizure, probable cause to believe the crime has been, is being, or will be committed is necessary. 18 U.S.C. §2518(3)(a). Furthermore, the government has a statutory duty to inform the issuing court of the identities of all of the persons whose communications have been intercepted. 18 U.S.C. §2518(8)(d); United States v. Donovan, 429 U.S. 413 (1977). Unintentional omission does not always require suppression, but naming only the principal targets is not enough. Id.

All of the elements required for a valid order for wiretap have been met. The order was issued by the proper authority. In his affidavit, the case agent indicated

whose phones would be tapped and the nature of the conversations to be recorded, an outline of the progress of the investigation, and the problems that had arisen that made routine investigative procedures insufficient.

The wiretap order was validly obtained and validly executed; the transcripts of the recorded conversations did not require suppression.

5. The district court did not err in finding that the evidence obtained from defendant Rodriguez's vehicle at the time of his arrest had been abandoned. The seizure of the case was proper, New York v. Belton, 453 U.S. 454 (1981), but the delay of several hours which occurred before the opening of that case vitiated the authority to search. However, when Rodriguez was questioned regarding ownership of the case at the time of his arrest,

he denied all knowledge and ownership of it. This denial constituted abandonment. United States v. Veatch, 674 F.2d 1217 (9th Cir. 1981). Therefore, the search of the case and the admission of its contents at trial was proper.

6. The testimony of the narcotics agent as to the meaning and use of narcotics trafficker code language was properly admitted. The trial court used commendable caution in determining the type of testimony that would be allowed.

The court reviewed United States v. Bailey, 607 F.2d 237 (9th Cir. 1979), cert. denied, 445 U.S. 934 (1980), and United States v. Cirillo, 499 F.2d 872 (2d Cir.), cert.denied, 419 U.S. 1056 (1974), and relied upon both cases in determining that a modified Bailey approach would be appropriate. The testifying agent was carefully qualified. He discussed

the elements of a narcotics transaction and described the manner in which these are sometimes encoded in speech. The court allowed the agent to testify as to the general meaning of the conversations prior to the reading of the transcripts but did not permit interruption of the reading to provide translations of seemingly innocent language. This limitation of the expert's testimony insured that the defendant was not prejudiced. The trial court did not abuse its discretion.

7. Evidence of possession of firearms was properly admitted. The Ninth Circuit has ruled that possession of firearms is relevant to show a defendant's "involvement in the narcotics trade." United States v. Martin, 599 F.2d 880,889 (9th Cir.), cert.denied, 441 U.S. 962 (1979). Possession of firearms is virtually equal in probative value to other common

"tools of the drug trade" such as scales, glassine bags, and cutting equipment. "Possession of a firearm demonstrated the likelihood that a defendant took steps to prevent contraband or money from being stolen." United States v. Kearney, 560 F. 2d 1358, 1369 (9th Cir.), cert.denied, 434 U.S. 971 (1977). The additional evidence of the firearms supports allegations that the defendants desired to protect their ill-gotten gains and their illegal operation. The court did not abuse its discretion in admitting the evidence of the firearms.

8. The search warrants were issued on probable cause. Probable cause exists where "the facts and circumstances within their [the agents'] knowledge, and of which they had reasonably trustworthy information ... [are] sufficient in themselves to warrant a man of reasonable caution in the belief" that a crime has been or is

being committed, and that property subject to seizure can be found in the place or on the person to be searched. Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132, 162 (1925). The telephone conversations upon which the applications for the search warrants were based were reviewed by experienced DEA agents familiar with the pattern of narcotics trafficker code language and found to consist of the typical language comprised of the typical elements. Additionally, the applications were not based upon these conversations alone but also upon related meetings between the defendants which were observed by the agents. The conclusions of the agents who sought the application had a factual basis which was set out in detail, allowing the magistrate to determine that the evidence sought could be found on the premises to be searched.

The search warrants were properly issued.

9. The evidence presented was sufficient to allow a rational trier of fact to find the defendants guilty of the essential elements of the crimes with which they were charged beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). The elements which must be proven for a conviction of conspiracy are: (1) an agreement to accomplish an illegal objective, (2) one or more overt acts in furtherance of the illegal purpose, and (3) the intent necessary to effectuate the conspiracy's purpose. United States v. Mezonor-Lopez, 627 F.2d 886, 890 (9th Cir. 1980); United States v. Bailey, 607 F. 2d 237, 243 (9th Cir. 1979); cert.denied, 445 U.S. 934 (1980). The test for determining whether the government has produced enough evidence to prove involvement beyond a reasonable doubt is threefold:

(1) the charged conspiracy actually existed; the defendant had at least a slight connection to it, and (3) the defendant knew he was connected to it. United States v. Smith, 609 F.2d 1294, 1297 (9th Cir.1979). At trial the prosecution presented evidence gathered through surveillance by government agents, searches of the defendants' homes and wiretaps of telephone conversations. Viewed in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1942), this was enough to meet the three-pronged test of Smith.

10. The supplemental brief filed by defendant Rodriguez contained several issues that were not included in the brief filed by his retained counsel. The record reveals no indication that any of the allegations raised in this brief constitute grounds for reversal.

Rodriguez has made no showing that

any concrete evidence existed to support the testimony of his wife that he was in Mexico on August 19, 1981.

The testimony of Officer Alford that Rodriguez was elsewhere on the same date could, of course, have been prejudicial to the defendant, but the purpose of testimony is to sway the jury; whether or not testimony is compelling is a determination to be made by the jury. The mere statements of the defendant and his wife without more evidence in support of the defendant's position is not the "substantial showing" of intentional, reckless falsehood by a government affiant which triggers a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978).

The jury did violate the instruction of the court in that it revealed its numerical standing on the guilt of one of the defendants prior to reaching a

unanimous verdict. However, the court promptly instructed the jury not to give any further such indication, and the defendant has made no showing that he was prejudiced as a result of the jury's initial failure to comply.

Finally, the transcript does not present an incomplete record. Rule 43 requires that the defendant be present at all stages of the trial, but the rule also incorporates an exception for discussions regarding questions of law. The transcript clearly shows that the morning question from the jury dealt with issues of the law of conspiracy. Therefore, the defendant's absence from the court on the morning of February 1, 1982 did not violate Rule 43.

Although the defendants have raised multiple issues on appeal, none warrants reversal. There is no indication that the court in any way abused its discretion,

allowed the defendants' rights to be violated, or erred causing prejudice to the defendants. In fact, the court carefully researched and weighed each decision, and fully explained the case law and reasoning behind each result.

AFFIRMED.

APPENDIX "B"

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 82-1108, 82-1200, 82-1249
DC No. CR 81-846-MML
Central California

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

GREGORIO SUAZO TORRES,
NARCISSO GONZALEZ-RIOS,
GERONIMO GUTIERREZ-SANCHEZ,

Defendants-Appellants.

ORDER

Before: FERGUSON and BOOCHEVER, Circuit Judges, and COYLE,* District Judge.

[Filed Apr. 3, 1985]

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*Hon. Robert E. Coyle, United States District Judge for the Eastern District of California, sitting by designation.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges Ferguson and Boochever voted to reject the suggestion for a rehearing en banc and Judge Coyle recommended the denial of the en banc request.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.